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Christine Baker, Personal Represenative of the Estate of Gary Baker, for herslf and the other heirs of Gary Baker v. Gregory P. Stevens, M.D.,; Richard M. Rosenthal, M.D.; and IHC Health Center--Holiday : Amicus Brief

Utah Supreme Court

IN THE SUPREME COURT OF UTAH

CHRISTINE BAKER, Personal Representative of the Estate of GARY BAKER, for herself and the other heirs of GARY BAKER, Plaintiff and Appellee, v. GREGORY P. STEVENS, M.D.; RICHARD M. ROSENTHAL, M.D.; and IHC HEALTH CENTER-HOLLADAY, Defendants and Appellants.	**BRIEF OF AMICUS CURIAE UTAH MEDICAL ASSOCIATION** Supreme Court No. 20030434-SC

APPEAL FROM DENIAL OF SUMMARY JUDGMENT ENTERED BY THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY, THE HONORABLE JUDGE CLAUDIA LAYCOCK PRESIDING

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CONSENT FOR AMICUS FILING

The Utah Medical Association ("UMA") currently represents approximately 3,100 physician members throughout the State of Utah. Approximately 50 percent of these physicians routinely enter into arbitration agreements with their patients. Many more physicians are contemplating the routine use of such agreements. UMA physicians are currently parties in wrongful death lawsuits brought by the heirs of deceased patients. It is unfortunate, but inevitable, that such cases will continue to be filed against UMA physicians in the future, and that arbitration agreements will be at issue. Many UMA physicians will thus be directly impacted by this Court's ruling in this appeal regarding the enforceability of a physician-patient arbitration agreement against a deceased patient's heirs for claims of wrongful death.

Accordingly, as UMA has a significant interest in the outcome of the Court's ruling in this appeal, all parties, appellants Gregory P. Stevens, M.D., Richard M. Rosenthal, M.D., and IHC Health Center-Holladay, and Appellee Christine Baker, personal representative of the estate of Gary Baker, have consented to the appearance of the UMA as *amicus curiae* as required by Rule 25 of the Utah Rules of Appellate Procedure. A Stipulation Consenting to the Filing of Amicus Brief by the Utah Medical Association was filed with this Court on February 13, 2004. A copy of this Stipulation is attached as Addendum A.

STATEMENT OF JURISDICTION
STATEMENT OF ISSUES AND STANDARD OF REVIEW

The UMA hereby adopts and incorporates the Statement of Jurisdiction, Statement of Issues and Standard of Review set forth in the briefs of Appellants.

IMPORTANT STATUTES

The determination regarding the enforceability of an arbitration agreement in a medical malpractice action is governed in part by the Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-17 (2002), and the Utah Arbitration Act, Utah Code Ann. §§ 78-31a-1 through 20 (2002). Copies of these statutes are attached at Addendum B.

STATEMENT OF THE CASE

The Utah Medical Association adopts and incorporates the Statement of the Case set forth in the briefs of Appellants.

SUMMARY OF ARGUMENT

The trial court erred in finding "that plaintiff's wrongful death action is separate and distinct from the cause of action the deceased would have had for personal injuries had he survived," (R. at 84-95), and in refusing to enforce the Arbitration Agreement against the decedent's heirs. Under well-established Utah law, a wrongful death action is not entirely separate and distinct from the cause of action the deceased would have had for the personal injuries had he survived. The wrongful death cause of action is based on the

underlying wrong done to the decedent, and is subject to defenses that could have been asserted against the decedent, which includes enforcement of an Arbitration Agreement.

Public policy favoring arbitration is well settled in Utah and throughout the United States. Failure to enforce the Arbitration Agreement in this case would adversely impact Utah physicians and their patients, contrary to public policy and state law. All existing physician-patient arbitration agreements in Utah with similar language would be rendered void as to wrongful death claims, frustrating the intent of the parties. It would arbitrarily limit arbitration in medical negligence exclusively to cases where the heirs cannot assert a claim. This would defeat well-established Utah arbitration law, which has been systematically developed to allow arbitration in the physician-patient context for all claims arising from medical care rendered.

If arbitration agreements were held unenforceable against heirs for claims of wrongful death, then they cannot be enforced against heirs for loss of consortium. The net effect would be to deprive parties of the right to contract for meaningful arbitration. It would, additionally, create the potential for anomalous results, as heirs could litigate their claims for loss of consortium, while the patient must arbitrate his/her medical negligence claim, on identical facts.

The policy reasons requiring the non-signing heirs to be bound by an arbitration agreement are far more convincing than any arguments to avoid enforcement of that agreement. Enforcement it is not only consistent with the Utah Arbitration statutes, but is

essential to further the goals of that legislation and the judicially declared preference in favor arbitration, whether in the context of medical care, or other areas in which individuals enter into service contracts.

ARGUMENT

I. UTAH HAS SYSTEMATICALLY ADOPTED ARBITRATION AS A SOUND AND FAVORED REMEDY THAT IS PROPERLY USED IN THE PHYSICIAN-PATIENT CONTEXT.

American courts, historically, refused to enforce agreements to arbitrate on the ground that such agreements ousted the courts from their jurisdiction. Stephen P. Bedell, Lolla Harrison and Brian Grant, Arbitrability: Current Developments in the Interpretation and Enforceability of Arbitration Agreements, 13 J. Contemp. L. 1, 1-2 (1987). To remedy this anachronism, Congress enacted the United States Arbitration Act of 1924. Id. The purpose of the Arbitration Act was to place arbitration agreements "upon the same footing as other contracts, where they belong . . . ." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess. 1-2 (1924)). With the passage of the Arbitration Act, Congress established "a strong federal policy favoring arbitration." Harrison & Grant, supra, at 1-2; accord Shearson/American Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (federal policy favors arbitration). In effect, "the Arbitration Act simply codifi[ed] the common law duty of courts to enforce the terms of valid contracts, and was necessitated only by the traditional reluctance of courts to enforce arbitration clauses." Harris & Grant, supra, at 1-2.

Numerous commentators have concluded that individuals fare at least as well in arbitration than court, if not better. See Leis L. Maltby, Private Justice: Employment Arbitration and Civil Rights, 30 Colum. Hum. Rts. L. Rev. 29, 54-55 (1998). Indeed, many consider arbitration as the ideal forum in which to decide legal disputes concerning healthcare. Keith Maurer, "Medical Justice Through Alternative Dispute Resolution," National Arbitration Forum (2002)<http://www.arb-forum.com/articles/html>; Ann H. Nevers, Medical Malpractice Arbitration in the New Millennium: Much Ado About Nothing?, 1 Pepp. Disp. Resol. L.J. 45, 89 (2000). A 1992 General Accounting Office study of medical malpractice litigation found it took 33 months to resolve a medical malpractice claim through the court, while arbitration took nineteen months. Medical Malpractice: Alternatives to Litigation, United States General Accounting Office Report to Congress, 9 (January, 1992). The study further found plaintiffs in litigation won about 33 percent of their cases, while plaintiffs in arbitration won 52 percent of their cases. Id. Consumer Reports magazine has observed, "Arbitration can help consumers settle their disputes faster and cheaper than by litigation." Consumer Reports, August 1999, p. 64.

The U.S. Supreme Court has consistently held that courts must compel arbitration when a valid arbitration agreement exists. See e.g., Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983); Southland Corp. v. Keating, 465 U.S. 2 (1984); Perry v. Thomas, 482 U.S. 483 (1987); Allied-Bruce Terminix Co. v. Dobson,

513 U.S. 265 (1995); Doctor's Assoc., Inc. v. Cassarotto, 517 U.S. 681 (1996). Virtually every state has, moreover, articulated a strong policy in favor of arbitration.[1]

Utah law comports with its federal and state counterparts in striving to enforce arbitration agreements. In 1927 the Utah Legislature enacted the Uniform Arbitration Act, which mandated enforcement of arbitration agreements. 1927 Utah Laws 62. Originally, the Act applied only to the arbitration of existing controversies and did not cover agreements to arbitrate future disputes. Allred v. Educators Mutual Ins. Ass'n of Utah, 909 P.2d 1263, 1265 (Utah 1996). However, in 1977 the Utah Legislature amended the Act to include the arbitration of future disputes. Utah Code. Ann.

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[1]/See e.g., Bureau of Special Investigations v. Coalition of Public Safety, 722 N.E.2d 441 (Mass. 2000) (strong public policy favoring arbitration); Vandenberg v. Superior Court, 982 P.2d 229 (Cal. 1999) (same); Martin v. Vance, 514 S.E.2d 306 (N.C. Ct. App. 1999) (same); Thunderstick Lodge, Inc. v. Reuer, 585 N.W.2d 819 (S.D. 1998) (arbitration favored); Northwester Mut. Life Ins. Co. v. Stinnett, 698 N.E.2d 339 (Ind. Ct. App. 1998) (strong public policy favoring arbitration); Perez v. Mid-Century Ins. Co., 934 P.2d 732 (Wash. Ct. App. 1997) (same); Anthony v Kaplan, 918 S.W.2d 174 (Ark. 1996) (same); Prudential Securities Inc. v. Marshall, 909 S.W.2d 896 (Tex. 1995) (arbitration of disputes is strongly favored under federal and state law); White v. Kampner, 642 A.2d 1381 (Conn. 1994) (arbitration favored); Graham v. State Farm Mut. Auto. Ins. Co., 565 A.2d 908 (Del. 1989) (same); Roe v. Amica Mut. Ins. Co., 533 So.2d 279 (Fla. 1988) (same); Dairyland Ins. Co. v. Rose, 591 P.2d 281 (N.M. 1979) (strong preference for resolution by arbitration); Modern Const., Inc. v. Barce, Inc., 556 P.2d 528 (Alaska 1976) (strong public policy favors arbitration); Grover-Diamond Assoc. v. American Arbitration Ass'n, 211 N.W.2d 787 (Minn. 1973) (same); Jensen v. Arrow Ins. Co., 494 P.2d 1334 (Ariz. Ct. App. 1972) (public policy of Arizona favors arbitration); Dominion Ins. Co. Ltd. v. Hart, 498 P.2d 1138 (Colo. 1972) (arbitration is favored).

§ 78-31-1 (1977). "Thus Utah law has favored arbitration provisions covering future disputes since 1977." Allred, 909 P.2d at 1265.

In 1996 this Court made clear that arbitration agreements are valid and enforceable in the physician-patient context, stating:

> We emphasis preliminarily that arbitration agreements are favored in Utah and that no public policy requires such agreements to be subject to a different analysis when they are between physicians and patients. They are enforceable if they meet the standards applicable to all contracts.

Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996). The Legislature codified this as a favored public policy in 1999 by amending the Utah Health Care Malpractice Act to specify the terms of enforceable physician-patient arbitration agreements. Utah Code Ann. § 78-14-17 (1999). In 2003 the Legislature further developed Utah arbitration law in the medical negligence context, amending the statute to authorize a health care provider to refuse care to a patient who does not agree to arbitration. Utah Code Ann. § 78-14-17 (Supp. 2003).

The Utah Legislature additionally revised the Utah Arbitration Act, effective May 2003, "to be more comprehensive and to (1) codify existing case law interpreting arbitration statutes, (2) resolve ambiguities inherent within the statutes, and (3) modernize arbitration practice and procedure." Kent B. Scott and James B. Belshe, Utah's Revised Uniform Arbitration Act: A Makeover for the Face of Arbitration, 16 Dec. Utah B. J. 26,

27 (Dec. 2003). The Act makes clear arbitration agreements are valid and enforceable under Utah law, and that parties can agree to arbitrate any controversy. It provides:

> An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract.

Utah Code Ann. § 78-31a-107(1) (2002). Thus, if a party "show[s] an agreement to arbitrate," the court "shall . . . order the parties to arbitrate." Id. at § 78-31a-108(1).

It is well-established that "the goal of the Act is to encourage extra-judicial settlement of legal disputes." Pacific Development, L.C. v. Orton, 2001 UT 36, ¶ 12, 23 P.3d 1035. "The [Utah Arbitration] Act supports arbitration of both present and future disputes and reflects long-standing public policy favoring speedy and inexpensive methods of adjudicating disputes. . . ." Allred, 909 P.2d at 1265; accord McCoy v. Blue Cross and Blue Shield of Utah, 2001 UT 31, ¶ 14, 20 P.3d 901; Sosa, 924 P.2d at 359; Buzas Baseball, Inc. v. Salt Lake Trappers, Inc., 925 P.2d 941, 946 (Utah 1996); DeVore v. IHC Hospitals, Inc., 884 P.2d 1246, 1251 (Utah 1994). This Court has long affirmed "the strong public policy in favor of arbitration as an approved, practical and inexpensive means of settling disputes and easing court congestion." Robinson & Wells v. Warren, 669 P.2d 844, 846 (Utah 1983).

Arbitration "is a remedy freely bargained for by the parties." Lindon City v. Engineers Constr. Co., 636 P.2d 1070, 1073 (Utah 1981). It is the policy of the law in

Utah to interpret contracts in favor of arbitration, "in keeping with [the] policy of encouraging extrajudicial resolution of disputes when the parties have agreed not to litigate." Central Fla. Inv., Inc. v. Parkwest Assoc., 2002 UT 3, ¶ 16, 40 P.3d 599.

> Arbitration clauses should be liberally interpreted when the issue contested is the scope of the clause. If the scope of an arbitration clause is debatable or reasonably in doubt, the clause should be construed in favor of arbitration unless it can be said that it is not susceptible to an interpretation that covers the asserted dispute.

Lindon, 636 P.2d at 1073 (emphasis added).

The Utah Supreme Court has a well-established history in defining a public policy that liberally encourages the broad enforcement of extrajudicial dispute resolution agreements that have been voluntarily entered into. See e.g., Central Florida, 2002 UT 3, ¶ 16; Buzas Baseball, 925 P.2d at 946; Allred, 90 P.2d at 1265; Intermountain Power Agency v. Union Pacific R.R Co., 961 P.2d 320, 325 (Utah 1988); Docutel Olivetti Corp. v. Dick Brady Systems, Inc., 731 P.2d 475, 479-480 (Utah 1986); Lindon, 636 P.2d at 1073.

II. UTAH LAW REQUIRES ENFORCEMENT OF THE ARBITRATION AGREEMENT AGAINST THE ESTATE AND HEIRS.

In the present case, the plain language of the Arbitration Agreement demonstrates the parties expressly contracted to submit to arbitration any dispute as to medical negligence arising out of the care provide by the physician, whether it is asserted by the patient or his heirs. The Agreement provides:

> We expressly intend that this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care rendered or which should have been rendered by Physician after the date of this Agreement, including any spouse or heirs of the patient and any children, whether born or unborn at the time of the occurrence giving rise to any claim.

(Arbitration Agreement Art. 1) (emphasis added) (copy attached as Addendum C).

The Agreement specifically applies to wrongful death claims:

> All claims for monetary damages against the physician . . . . must be arbitrated including, without limitation, claims for personal injury, loss of consortium, wrongful death, emotional distress or punitive damages.

(Id.) (Emphasis added).

The plaintiff/appellee does not dispute that the Arbitration Agreement is a valid enforceable agreement and that it would have been enforceable against Mr. Baker had he survived. The question before this Court is whether the terms of this Arbitration Agreement can be enforced against Mr. Baker's heirs since they were not parties to the Agreement. The trial court ruled it cannot, finding "that plaintiff's wrongful death action is separate and distinct from the cause of action the deceased would have had for personal injuries had he survived." (R. at 84-95.) Not only does the court's ruling ignore public policy favoring arbitration, but it is expressly premised on a misinterpretation of Utah law.

Although Utah courts recognize that "an action for wrongful death is an independent action accruing in the heirs of the deceased," Utah courts have "not entirely separated the heirs' right from the decedent's because the heirs' right is in major part based

on the rights of support, both financial and emotional, that run to them from the deceased." Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997). In Jensen this Court stated:

> We have held that the wrongful death cause of action is based on the underlying wrong done to the decedent and may only proceed subject to at least some of the defenses that would have been available against the decedent had she lived to maintain her own action.

Id. at 332 (emphasis added).[2]

Thus, based on this authority, a Utah wrongful death action is not entirely independent from the cause of action the deceased would have had for the personal injuries had he survived. Rather, "the wrongful death cause of action is based on the underlying wrong done to the decedent." Id. The instant wrongful death cause of action

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[2]/The Utah wrongful death statute has been interpreted by the Tenth Circuit Court of Appeals to preclude suit by heirs where a deceased person could not have maintained such suit. The Tenth Circuit explained the principle as follows:

> [E]ven though it is a separate and distinct action which arises on the death of the decedent, the foundation of the right of action is the original wrongful injury to the decedent. And it is essential to the maintenance of the action that the wrongful act or default be of such character that the decedent could have maintained an action to recover damages for his injury if death had not ensured. While it is not a derivative action in the ordinary meaning of the term, recovery cannot be had unless the decedent could have recovered damages for his wrongful injury had he survived. . . .

Francis v. Southern Pac. Co., 162 F.2d 813 (10th Cir. 1947), aff'd 333 U.S. 445 (1948).

is thus necessarily predicated on the decedent's medical care, and the relationship entered into by the patient and the physician.

The wrongful death cause of action is, moreover, subject to defenses that could have been asserted against the deceased. Id. The following are examples of defenses that Utah courts have recognized against a decedent's heirs: 1) heirs are bound by a comparative negligence defense to the extent it would be enforceable against the deceased and any causes of action the deceased could have brought, Kelson v. Salt Lake County, 784 P.2d 1152, 1155 (Utah 1998); 2) heirs are bound by the Utah Workers' Compensation Act as to claims against the deceased's employer, Utah Code Ann. § 34A-2-105 (1997); and 3) heirs are bound by a statute of limitations defense enforceable against the deceased and any causes of action the deceased could have brought. Jensen, 944 P.2d at 332.

Had the decedent survived and sued for the alleged medical negligence at issue in this case, the Arbitration Agreement would clearly be binding against him to terminate litigation and compel arbitration. Where, as here, a patient expressly contracts to submit to arbitration any dispute as to medical malpractice, it must be deemed to apply to all medical negligence claims arising out of the care provided, whether they are asserted by the patient or a third party.

The case of Jensen v. IHC Hospitals, Inc., 944 P.2d 327, 332 (Utah 1997), mandates this result. In Jensen, this Court held that heirs could not maintain a wrongful

death suit where the "injured patient . . . chose to let the statute of limitations run on the underlying personal injury claim" prior to her death. Id. at 332-333. In such a situation, the heirs' wrongful death claims are barred by the statute of limitations." Id. at 332-333.

The Jensen Court declined to separate the death from the causative wrong to permit a wrongful death action, where the decedent's personal injury cause of action was barred at the time of death, stating:

> "The injured individual is not merely a conduit for the support of others, he is master of his own claim and he may settle the case or win or lose a judgment on his own injury even though others may be dependent upon him."

Jensen, 944 P.2d at 322 (emphasis added) (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 955 (5th ed. 1984)). This Court recognized "[t]he majority of states refuse[] to allow a decedent's heirs to proceed with a wrongful death suit after the decedent has settled his or her personal injury case or won or lost a judgment before dying." Jensen, 944 P.2d at 332-333.

Under Jensen, as "master of his own claim," a patient can completely cut off the potential wrongful death claims of his heirs by not initiating a lawsuit prior to the expiration of the statute of limitations, either accidentally or intentionally. The heirs' wrongful death claim is not so separate and independent as to allow them a separate statute of limitations; rather, they are bound to the limitations period applicable to the patient and to the patient's relating course of conduct prior to death.

If the Arbitration Agreement this case were not enforced against the heirs of the deceased patient, then under Jensen, a patient could completely cut of his heirs from asserting a claim for wrongful death by mere inaction, yet that same a patient could not intentionally agree to the forum for resolution by entering into an arbitration agreement. Such a result is not only anomalous, but graces heirs with broader options for recourse relating to medical care provided to the patient than the patient himself would have had.

Cases with similar facts from other jurisdictions have enforced arbitration agreements against heirs in wrongful death claims. In Allen v. Pacheco, 71 P.3d 375 (Colo. 2003) (en banc), cert. denied, 2004 WL 324431 (U.S. 2004), for example, a surviving wife filed a wrongful death claim alleging negligence by her husband's health care providers. The providers sought to submit the claim to binding arbitration pursuant to an arbitration provision between the husband and his HMO. Applying contract construction principles, the Colorado Supreme Court examined the arbitration agreement and determined that the language plainly applied to "any claim of medical malpractice," which included the wife's claim for wrongful death, even though she did not sign the arbitration agreement. Id. at 378-379.

The Alllen court stated: "We hold that the arbitration agreement does apply to non-party spouses because . . . a non-party may be bound by the terms of an agreement if the parties so intend . . . ." Id. at 379 (emphasis added). It explained:

> Although it is true that a wrongful death claim is separate and distinct from a cause of action the deceased could have maintained had he survived, this observation is not helpful in determining whether separate wrongful death claims are in fact included within the plain and ordinary meaning of the agreement. Because the plain language of the agreement in this case refers to "all claims" including those brought for "death," and because we must apply a strong presumption in favor of arbitration, we find that the arbitration agreement applies to wrongful death claims.

Id. at 379-380 (emphasis added).[3]

Likewise, in Ballard v. Southwest Detroit Hospital, 327 N.W.2d 370 (Mich. Ct. App. 1982), the Michigan Court of Appeals held an arbitration agreement executed by a deceased patient was binding upon the personal representative. The Ballard court stated:

> Any substantive impediment that would have prevented the decedent from commencing suit will likewise preclude suit by the personal representative. For example, where the decedent's death is the result of an injury arising out of the course of his employment, the estate is bound, as the decedent would have been, to the exclusive remedy provision of the worker's compensation act, and the personal representative will be prevented from maintaining a separate wrongful death action.

Id. at 371.

Arbitration agreements are, moreover, routinely enforced against non-signing heirs in other contexts. In Jansen v. Salomon Smith Barney, Inc., 776 A.2d 816 (N.J. Super. App. Div. 2001), for example, beneficiaries of retirement accounts brought a negligence

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[3]/The Allen court went on to determine, however, that the arbitration agreement at issue in that case was unenforceable because it failed to comply with the requirements of the Colorado Health Care Availability Act. Allen, 71 P.3d at 384.

action against their father's financial advisors. The New Jersey Superior Court held that the beneficiaries' claim arose out of the father's agreement, and thus they were bound by the arbitration clause. The Jansen court explained:

> Arbitrability of a particular claim "depends not upon the characterization of the claim, but upon the relationship of the claim to the subject matter of the arbitration clause."

Id. at 258 (quoting Wasserstein v. Kovatch, 618 A.2d 886, 286 (N.J. Super. App. Div. 1993)).

Similarly, in Smith, Barney, Inc. v. Henry, 775 So.2d 722 (Miss. 2001), the Mississippi Supreme Court determined that the heirs to financial accounts could be compelled to arbitrate their claims relating to negligent management of the funds. In that case, the decedent left in trust to her daughter two financial accounts overseen by Smith Barney. Id. at 723. After the funds in both accounts were wrongfully transferred to another party, the daughter sued Smith Barney for breach of fiduciary duty to the estate and negligent conversion of the funds. Id. at 724.

Smith Barney sought to compel arbitration, and the Mississippi Supreme Court determined that the all of the beneficiary's claims arose out of or related to the decedent's accounts. In reaching this conclusion, the Smith Barney court emphasized that because the "funds which [were] the subject of [the beneficiary's] claims were derived directly from [the decedent's] accounts and transactions with smith Barney," the arbitration provision was binding. Id. at 726. The court rejected the plaintiff's argument that she was a

non-signatory to the agreement and an unintended third-party beneficiary. The court held that the express terms of the decedent's will named the plaintiff a successor to the decedent's rights and thus subjected her to arbitration. Id. at 727.

Additionally, in Collins v. Merrill Lynch, Pierce, Fenner and Smith, Inc., 561 So.2d 952 (La. Ct. App. 1990), the Louisiana Court of Appeals reversed the trial court's denial of a motion to compel arbitration, and held non-signatory heirs and successors were bound by a decedent's arbitration agreement with a brokerage firm, where the agreement expressly bound successors and assigns. Id. at 955. The Collins court held the defendants were entitled to arbitration because "the Customer Agreement on its face applies to all accounts of a customer, whether CMA's or otherwise, and clearly requires arbitration of all disputes arising out of the customer's business with Merrill Lynch." Id.

Similar results have been reached in other contexts. See, e.g., American Bureau of Shipping v. Tencara Shipyard, 170 F.3d 349, 352 (2d Cir. 1999) (non-signatory insurance underwriter compelled to arbitrate); Seborowski v. Pittsburgh Press Co., 188 F.3d 163, 168 (3d Cir. 1999) (non-signatory beneficiaries of deceased employees compelled to arbitrate claims alleging breach of collective bargaining agreement signed by deceased employees); In re Oil Spill by the Amoco Cadiz, 659 F.2d 789, 795-96 (7th Cir. 1981) (non-signatory transport company subject to arbitration as an agent of plaintiff).

These cases demonstrate both the broad acceptance of fundamental law favoring enforcement of an arbitration agreement against non-signatories where claims are based on

the relationship subject to the agreement, and the potential that this Court's ruling will significantly impact contractual rights and claims beyond the healthcare arena. Arbitration agreements are commonplace in uniform real estate contracts, design and construction contracts, brokerage account agreements, and mortgage agreements.

This Court has "repeatedly held that competent parties are free to bargain for any term that does not require a violation of the law." Salt Lake County v. Western Dairymen Co-op., Inc., 2002 UT 39, ¶ 18, 48 P.3d 910; accord Phone Directories Co. v. Henderson, 2000 UT 64, ¶ 15, 8 P.3d 256. The patient should be able to determine by contract the forum where medical care provided to him will be addressed. Decedents are able to bind their heirs through other contracts, wills and testamentary dispositions, so the concept is neither new or illogical. It is, moreover, the policy adopted by most federal and state law across the country.

III. FAILURE TO ENFORCE THE ARBITRATION AGREEMENT IN THIS CASE WILL ADVERSELY IMPACT UTAH PHYSICIANS AND THEIR PATIENTS, EVISCERATING ESTABLISHED UTAH ARBITRATION LAW.

If this Court were to hold the Arbitration Agreement unenforceable against the decedent's heirs' claim for wrongful death, all existing physician-patient agreements in Utah with similar language would be rendered void as to wrongful death claims. This would frustrate the intent of the parties to these agreements, which is to arbitrate all claims arising out of the health care provided, including claims by heirs for wrongful death.

Such a ruling would, moreover, limit arbitration in medical negligence exclusively to cases where the heirs cannot assert a claim. This scenario would defeat well-established and carefully developed Utah arbitration law. Wrongful death claims are filed by heirs in cases arising from virtually every specialty of medical care. To exclude wrongful death claims from arbitration agreements would leave a gaping whole in every arbitration agreement, regardless of the patient's wishes.

Under the trial court's ruling, the only way to create an enforceable arbitration agreement covering all claims arising out of medical care provided, including claims for wrongful death, would be for spouses and all potential heirs to join in the execution of the arbitration agreement. It is unrealistic to require the signatures of all the heirs to bind them to an arbitration agreement, particularly since they may not even be identified until the time of death.

Requiring heirs to participate in the creation of the arbitration agreement in order to encompass claims of wrongful death would have the equally troublesome effect of requiring disclosure of confidential medical treatment, and even worse, requiring the heirs' concurrence in the treatment. This approach would authorize an intrusion into a patient's confidential relationship with his physician as the price for guaranteeing a third person access to a jury trial on matters arising from the patient's own treatment.

Adoption of such a philosophy would violate the sanctity of the physician-patient relationship--a safe haven which would be severely threatened if the physician were obliged

to obtain the signature of the patient's heirs to create an arbitration agreement. How is a patient to maintain privacy in his or her physician consultations when, in essence, an heir's intrusion into the relationship is a prerequisite to its formation? Such roadblocks to establishing an arbitration agreement would be at odds with Utah legislation allowing physician-patient arbitration agreements for claims arising from the treatment provided. The purpose of the Act is to facilitate, not eviscerate, the favored process of arbitration.

IV. ENFORCEMENT OF THE ARBITRATION AGREEMENT IS REQUIRED BY THE PHYSICIAN-PATIENT RELATIONSHIP.

The legal nature of the physician-patient relationship requires enforcement of the arbitration agreement against the decedent's heirs' wrongful death claims. The physician-patient relationship is wholly voluntary, created by agreement, express or implied. Garay v. County of Bexar, 810 S.W.2d 760, 764 (Tex. Ct. App. 1991). Under this consensual physician-patient relationship, the patient seeks medical assistance and the physician agrees to render treatment. Heller v. Peekskill Community Hosp., 603 N.Y.S.2d 548 (N.Y. App. Div. 1993). The physician-patient relationship is in this sense contractual, and the physician and the patient may agree to make an arbitration agreement a term of their relationship. See Sosa v. Paulos, 924 P.2d 357, 359 (Utah 1996); Utah Code Ann. § 78-14-17 (2002).

The physician's legal duty of care is predicated on the existence of this physician-patient relationship. See Dalley v. Utah Regional Med. Ctr., 791 P.2d 193, 195 (Utah

1990); Farrow v. Health Servs. Corp., 604 P.2d 474, 496 (Utah 1979). "A physician cannot be liable for medical malpractice unless the physician breaches a duty flowing from a physician-patient relationship." El Majzoub v. Appling, 95 S.W.3d 432, 436 (Tex. Ct. App. 2002). It is thus universally accepted that "a medical malpractice action may not be maintained in the absence of a physician-patient relationship." Gilinsky v. Indelicato, 894 F. Supp. 86, 90 (E.D.N.Y. 1995). Claims by a patient's wife for damages allegedly caused by medical negligence, i.e., wrongful death, are thus predicated on her husband's physician-patient relationship. As the heirs' claims are premised on the physician-patient relationship, they must be subject to the agreed-upon terms of that relationship: the Arbitration Agreement.

In this case, the physician-patient relationship between the decedent and his physician is the point of origin for any malpractice claim against the physician, by either his wife, the estate, or any other heir. It was the decedent who entered into the physician-patient relationship with Dr. Rosenthal, and they undisputedly contracted to make the Arbitration Agreement a term of their physician-patient relationship. Although Christine Baker and the other heirs are not signatories to the Agreement, they are bound by it as it defines the scope and conditions of the physician-patient relationship that forms the basis for their claims.

The necessity of this result is well-illustrated in the informed consent context. Under Utah informed consent law, the physician has a duty to disclose to his patient "risks

of injury [that] might be incurred from a proposed course of treatment." Lounsbury v. Capel, 836 P.2d 188, 193 (Utah Ct. App.), cert. denied, 843 P.2d 1042 (Utah 1992). A physician's duty of disclosure arises from the physician-patient relationship and is owed to the patient, not to the patient's spouse or other family members. Id. at 198. The decision whether or not to agree to treatment in light of the risks is vested in the patient. Id. at 197. If the patient agrees to treatment and consents to the risks attendant thereto, his wife is bound by his consent. She could not file a loss of consortium or wrongful death claim on the basis that she did not personally consent to the risks of treatment, or did not sign the informed consent document. Thus the concept of investing the competent patient with complete and unbridled decision-making power relative to his/her care and all claims arising therefrom is fundamental to the physician-patient relationship under Utah law.

V. FAILURE TO ENFORCE THE ARBITRATION AGREEMENT WILL CREATE THE POTENTIAL FOR ANOMALOUS RESULTS WHEN LOSS OF CONSORTIUM AND SURVIVAL CLAIMS ARE ALSO ASSERTED.

A. LOSS OF CONSORTIUM.

If, as the trial court here ruled, arbitration agreements are held to be unenforceable against heirs for claims of wrongful death, then arbitration agreements logistically would also be held unenforceable against non-signing spouses for claims of loss of consortium. This would conflict with the fact that a loss of consortium claim is by statute a derivative

claim subject to all of the same defenses as the underlying negligence claim. Utah Code Ann. § 30-2-11 (1998).

Moreover, if non-signatories are not bound to arbitrate claims of loss of consortium arising out of medical care rendered by the physician, they could proceed to litigate that claim while the patient would be compelled to arbitrate claims for medical negligence arising out of the same medical care. The physician would have to answer in both arbitration and in a civil suit for claims dependent on identical facts regarding the professional standard of care, its breach by the defendant and causation of injury to the patient. This result is contrary to the purpose of the Arbitration Act, no savings would be effected, and there would be the potential for conflicting results.

B. SURVIVAL CLAIMS.

The failure to enforce arbitration agreements against heirs for claims of wrongful death would also be inconsistent with Utah law governing survival claims. The Utah survival statute provides:

> Causes of action arising out of personal injury to the person or death caused by the wrongful act or negligence of another do not abate upon the death of the wrongdoer or the injured person. The injured person or the personal representatives or heirs of the person who died have a cause of action against the wrongdoer or the personal representatives of the wrongdoer for special and general damages . . . .

Utah Code Ann. § 78-11-12(1)(a) (2002).

Utah law is clear that wrongful death and survival claims are separate and distinct claims, allowing recovery of separate and distinct damages. Camp v. Office of Recovery Services, 779 P.2d 242, 2476 (Utah Ct. App. 1989). However, Utah law also provides that the personal representative of a decedent's estate is bound by contracts signed by the decedent. See In re Estate of Shepley, 645 P.2d 605 (Utah 1982); see also Colorado Nat'l Bank of Denver v. Friedman, 846 P.2d 159 (Colo. 1993) (en banc). Thus, a survival claim is subject to an arbitration agreement by the decedent.

Wrongful death claims often go hand-in-hand with survival claims, as the starting point for both actions is an injury resulting in the decedent's death. If arbitration agreements were held to be unenforceable against heirs for claims of wrongful death, then the survival and wrongful death claims could be separated between the courts and arbitration. The result would unworkable, inefficient, and would create the potential for conflicting results.

CONCLUSION

The reasons requiring the non-signing heirs to be bound by an Arbitration Agreement are far more convincing than any arguments to avoid enforcement of that Agreement. It is not only consistent with the language of the Utah Arbitration statutes, but is essential to further the goals of the legislative and judicially declared policy favoring arbitration, to safeguard the physician-patient relationship, to preserve important privacy rights of the patient, and to honor the rights of parties to enter contracts.

DATED this 25TH day of February, 2004.

WILLIAMS & HUNT

By _____

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of February, 2004, two (2) true and correct copies of the foregoing **Brief of Amicus Curiae Utah Medical Association** were mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

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ADDENDA

1. Stipulation Consenting to the Filing of Amicus Brief by the Utah Medical Association was filed with this Court on February 13, 2004;

2. Utah Health Care Malpractice Act, Utah Code Ann. § 78-14-17 (2002), and the Utah Arbitration Act, Utah Code Ann. §§ 78-31a-1 through 20 (2002)(repealed effective May 15, 2003); and

3. Arbitration Agreement.

ADDENDUM A

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IN THE SUPREME COURT OF UTAH

CHRISTINE BAKER, Personal Representative of the Estate of GARY BAKER, for herself and the other heirs of GARY BAKER, Plaintiff and Appellee, v. GREGORY P. STEVENS, M.D.; RICHARD M. ROSENTHAL, M.D.; and IHC HEALTH CENTER-HOLLADAY, Defendants and Appellants.	**STIPULATION CONSENTING TO THE FILING OF A BRIEF BY THE UTAH MEDICAL ASSOCIATION AS AN AMICUS CURIAE** Supreme Court No. 20030434-SC (Trial Court No. 020404386)

Pursuant to Rule 25 of the Utah Rules of Appellate Procedure, the parties, by and through their respective counsel of record, hereby stipulate and give their consent for the Utah Medical Association to file a brief as an *amicus curiae* in support of the position of defendants/appellants Richard M. Rosenthal, M.D., Gregory Stevens, M.D. and IHC

Health Center-Holladay, within the time allowed for the submission of the briefs of defendants/appellants, which is through and including February 25, 2004.

HOWARD, LEWIS & PETERSEN

Dated: February 6, 2004

By _____
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Attorneys for Plaintiff/Appellee Christine Baker

SNOW, CHRISTENSEN & MARTINEAU

Dated: 6 February 2004

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AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Mary C. Wardell, being duly sworn, says that she is employed in the law offices of Williams & Hunt, attorneys for the Utah Medical Association herein; that she served the attached STIPULATION CONSENTING TO THE FILING OF A BRIEF BY THE UTAH MEDICAL ASSOCIATION AS AN AMICUS CURIAE in Case No. 2003043SC before the Utah Supreme Court, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

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and causing the same to be mailed first class, postage prepaid, on the 13th day of February, 2004.

Mary C. Wardell

SUBSCRIBED AND SWORN TO before me this 5TH day of February, 2004.

NOTARY PUBLIC
DANETTE A LYON
257 East 200 South Ste 500
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COMMISSION EXPIRES
September 11, 2006
STATE OF UTAH

Notary Public

ADDENDUM B

COLLATERAL REFERENCES

A.L.R. — Liability of hospital or sanitarium for negligence of physician or surgeon, 51 A.L.R.4th 235.

78-14-16. Proceedings considered a binding arbitration hearing upon written agreement of parties — Compensation to members of panel.

Upon written agreement by all parties, the proceeding may be considered a binding arbitration hearing and proceed under Title 78, Chapter 31a, except for the selection of the panel, which is done as set forth in Subsection 78-14-12(4). If the proceeding is considered an arbitration proceeding, the parties are equally responsible for compensation to the members of the panel for services rendered.

History: C. 1953, 78-14-16, enacted by L. 1985, ch. 238, § 5.

COLLATERAL REFERENCES

A.L.R. — Arbitration of medical malpractice claims, 24 A.L.R.5th 1.

78-14-17. Arbitration agreements.

(1) After May 2, 1999, for a binding arbitration agreement between a patient and a health care provider to be validly executed or, if the requirements of this Subsection (1) have not been previously met on at least one occasion, renewed:

(a) the patient shall be given, in writing and by verbal explanation, the following information on:

(i) the requirement that the patient must arbitrate a claim instead of having the claim heard by a judge or jury;

(ii) the role of an arbitrator and the manner in which arbitrators are selected under the agreement;

(iii) the patient's responsibility, if any, for arbitration-related costs under the agreement;

(iv) the right of the patient to decline to enter into the agreement and still receive health care;

(v) the automatic renewal of the agreement each year unless the agreement is canceled in writing before the renewal date; and

(vi) the right of the patient to have questions about the arbitration agreement answered; and

(b) the agreement shall require that:

(i) one arbitrator be collectively selected by all persons claiming damages;

(ii) one arbitrator be selected by the health care provider;

(iii) a third arbitrator be jointly selected by all persons claiming damages and the health care provider from a list of individuals approved as arbitrators by the state or federal courts of Utah;

(iv) all parties waive the requirement of Section 78-14-12 to appear before a hearing panel in a malpractice action against a health care provider;

(v) the patient be given the right to rescind the agreement within 30 days of signing the agreement; and

(vi) the term of the agreement be for one year and that the agreement be automatically renewed each year unless the agreement is canceled in writing by the patient or health care provider before the renewal date.

(2) Notwithstanding Subsection (1), a patient may not be denied health care of any kind on the sole basis that the patient or a person described in Subsection (5) refused to enter into a binding arbitration agreement with a health care provider.

(3) A written acknowledgment of having received a written and verbal explanation of a binding arbitration agreement signed by or on behalf of the patient shall be a defense to a claim that the patient did not receive a written and verbal explanation of the agreement as required by Subsection (1) unless the patient:

(a) proves that the person who signed the agreement lacked the capacity to do so; or

(b) shows by clear and convincing evidence that the execution of the agreement was induced by the health care provider's affirmative acts of fraudulent misrepresentation or fraudulent omission to state material facts.

(4) The requirements of Subsection (1) do not apply to a claim governed by a binding arbitration agreement that was executed or renewed before May 3, 1999.

(5) A legal guardian or a person described in Subsection 78-14-5(4), except a person temporarily standing in loco parentis, may execute or rescind a binding arbitration agreement on behalf of a patient.

(6) This section does not apply to any arbitration agreement that is subject to the Federal Arbitration Act, 9 U.S.C. Sec. 1 et seq.

History: C. 1953, 78-14-17, enacted by L. 1999, ch. 278, § 1.

Effective Dates. — Laws 1999, ch. 278 became effective on May 3, 1999, pursuant to Utah Const., Art. VI, Sec. 25.

CHAPTER 14a

LIMITATION OF THERAPIST'S DUTY TO WARN

Section

78-14a-101. Definitions.

As used in this chapter, "therapist" means:

History: C. 1953, 78-30-18, enacted by L. 1987, ch. 39, § 5; 1992, ch. 30, § 182; 1995, *ch. 20, § 167.*

78-30-19. Restrictions on disclosure of information — Violations — Penalty.

(1) Information maintained or filed with the bureau under this chapter may not be disclosed except as provided by this chapter, or pursuant to a court order.

(2) Any person who discloses information obtained from the bureau's voluntary adoption registry in violation of this chapter, or knowingly allows that information to be disclosed in violation of this chapter is guilty of a class A misdemeanor.

History: C. 1953, 78-30-19, enacted by L. 1987, ch. 39, § 6.

Cross-References. — Sentencing for misdemeanors, §§ 76-3-201, 76-3-204 76-3-301

CHAPTER 31
ARBITRATION [REPEALED]

78-31-1 to 78-31-22. Repealed.

Repeals. — Laws 1986, ch 128, § 1 repeals §§ 78-31-1 to 78-31-22, as originally enacted by Laws 1951, Chapter 58, relating to arbitration, effective April 28 1986 For present comparable provisions, see §§ 78-31a-1 to 78-31a-20

CHAPTER 31a
ARBITRATION ACT [REPEALED EFFECTIVE MAY 15, 2003]

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15. 2003

78-31a-1. Short title [Repealed effective May 15, 2003].

This act shall be known as the "Utah Arbitration Act."

History: C. 1953, 78-31a-1, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003.

Meaning of "this act." — The phrase "this act" means Laws 1985, Chapter 225, which enacted this chapter.

Severability Clauses. — Section 2 of Laws 1985, ch. 225 provided: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act is given effect without the invalid provision or application."

Cross-References. — Fire fighters' negotiations, §§ 34-20a-7 to 34-20a-9.

NOTES TO DECISIONS

ANALYSIS

Future disputes.
Cited.

Future disputes.

State law has favored arbitration provisions covering future disputes since 1977. Allred v. Educators Mut. Ins. Ass'n, 909 P.2d 1263 (Utah 1996).

Cited in Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, 1 P.3d 1095.

COLLATERAL REFERENCES

Utah Law Review. — Attorney-Client Fee Arbitration: A Dissenting View, 1990 Utah L. Rev. 277.

Conditions Under Which Oral Arbitration Agreements Become Binding, 1999 Utah L. Rev. 1054.

Brigham Young Law Review. — Alternatives to the Tort System for the Nonmedical Professions: Can They Do the Job?, 1981 B.Y.U. L. Rev. 57.

Journal of Contemporary Law. — Preemption of State Arbitration Statutes: the Exaggerated Federal Policy Favoring Arbitration, 19 J. Contemp. L. 1 (1993).

Journal of Energy Law and Policy. — Settling Flood Hazard Conflict: The Utah Lake and Jordan River Experience, 8 J. Energy L. & Pol'y 199 (1988).

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award § 1 et seq.

C.J.S. — 6 C.J.S. Arbitration § 1 et seq.

A.L.R. — Availability and scope of declaratory judgment actions in determining rights of parties, or powers and exercise thereof by arbitrators, under arbitration agreements, 12 A.L.R.3d 854.

Validity and effect, and remedy in respect, of contractual stipulation to submit disputes to arbitration in another jurisdiction, 12 A.L.R.3d 892.

Municipal corporation's power to submit to arbitration, 20 A.L.R.3d 569.

Uninsured motorist endorsement, validity and enforceability of provision for binding arbitration, and waiver thereof, 24 A.L.R.3d 1325.

Delay in asserting contractual right to arbitration as precluding enforcement thereof, 25 A.L.R.3d 1171.

Waiver of, or estoppel to assert, substantive right or right to arbitrate as question for court or arbitrator, 26 A.L.R.3d 604.

Enforcement, breach or repudiation of collective labor contract as subject to, or as affecting right to enforce, arbitration provision in contract, 29 A.L.R.3d 688.

Validity and construction of state statutes

making breach of a collective labor contract an unfair labor practice, 30 A L R 3d 431

Breach or repudiation of contract as affecting right to enforce arbitration clause therein, 32 A L R 3d 377

Privileged nature of communications made in course of grievance or arbitration procedure provided for by collective bargaining agreement, 60 A L R 3d 1041

Application of labor dispute disqualification for benefits to locked out employee, 62 A L R 3d 437

Validity and construction of statutes or ordinances providing for arbitration of labor disputes involving public employees, 68 A L R 3d 885

Demand for or submission to arbitration as affecting enforcement of mechanic's lien, 73 A L R 3d 1042

Filing of mechanic's lien or proceeding for its enforcement as affecting right to arbitration, 73 A L R 3d 1066

Statute of limitations as bar to arbitration under agreement, 94 A L R 3d 533

Defendant's participation in action as waiver of right to arbitration of dispute involved therein, 98 A L R 3d 767

Claim of fraud in inducement of contract as *subject to compulsory arbitration clause* contained in contract, 11 A L R 4th 774

Failure to pursue or exhaust remedies under union contract as affecting employee's right of state civil action for retaliatory discharge, 32 A L R 4th 350

Liability of organization sponsoring or administering arbitration to parties involved in proceeding, 41 A L R 4th 1013

Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A L R 4th 127

Arbitration of medical malpractice claims, 24 A L R 5th 1

Validity and construction of agreement between attorney and client to arbitrate disputes arising between them, 26 A L R 5th 107

Validity and construction of provisions for arbitration of disputes as to alimony or support payments or child visitation or custody matters, 38 A L R 5th 69

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A L R 5th 757

Validity and effect under state law of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A L R 5th 595

Re-exhaustion of arbitration procedure as appropriate course for resolving backpay issues arising as a result of resolution of grievance, 59 A L,R Fed 501

Employee s right to intervene in federal judicial proceeding concerning labor arbitration award, 59 A L R Fed 733

Consolidation by federal court of arbitration proceedings brought under Federal Arbitration Act (9 USCS § 4), 104 A L R Fed 251

78-31a-2. Definitions [Repealed effective May 15, 2003].

(1) "Arbitrators" means one or more arbitrators as appointed by the court or agreed upon by the parties

(2) "Court" means any state district court in Utah

History: C. 1953, 78-31a-2, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15 2003

Cross-References. — Board of labor, conciliation and arbitration. Utah Const , Art XVI, Sec 2

NOTES TO DECISIONS

"Court."

This chapter creates a statutory remedy for judicial enforcement, modification, or vacation of an arbitration award, and specifically provides that the remedy will be implemented by *proceedings in the district courts of this state* Transworld Sys v Robison, 796 P 2d 407 (Utah Ct App 1990)

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award § 84

C.J.S. — 6 C J S Arbitration § 58

78-31a-3. Arbitration agreement [Repealed effective May 15, 2003].

A written agreement to submit any existing or future controversy to arbitration is valid, enforceable, and irrevocable, except upon grounds existing at law or equity to set aside the agreement, or when fraud is alleged as provided in the Utah Rules of Civil Procedure.

History: C. 1953, 78-31a-3, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Labor Commission to promote voluntary arbitration of labor disputes, § 34A-1-103

Partnership, single partner may not submit to arbitration, § 48-1-6

Policy that work terms and conditions should result from voluntary agreement, § 34-20-1

Public transit district labor disputes § 17A-2-1032

Water disputes, informal arbitration by state engineer, § 73-2-16

NOTES TO DECISIONS

ANALYSIS

Municipal corporations
Oral modification
Prerequisites
Unconscionability
—Procedural
—Substantive
Waiver
Cited

Municipal corporations.

Absent a statutory prohibition, a municipal corporation has the power to submit to arbitration any claim asserted by or against it Lindon City v Engineers Constr Co , 636 P2d 1070 (Utah 1981)

Oral modification.

Because standard principles of contract construction allow parties to agree to modify a written contract by their conduct or oral agreement, an unwritten agreement to modify the jurisdiction of an arbitrator was enforceable Pacific Dev, L C v Orton, 1999 UT App 217, 982 P2d 94

Prerequisites.

Because this section provides that only a written agreement to submit a claim to arbitration is valid and enforceable, an arbitration agreement must be written to be enforceable under § 78 31a-4 Jenkins v Percival, 962 P2d 796 (Utah 1998)

Unconscionability.

—Procedural.

Where patient was given the physician-patient arbitration agreement to sign just minutes before her surgery without any opportunity to discuss the terms of the agreement or the option of not signing it, the elements of procedural unconscionability surrounded the negotiation of this agreement Sosa v Paulos, 924 P2d 357 (Utah 1996)

—Substantive.

The term in a physician-patient arbitration agreement, requiring the arbitration panel to be comprised of neutrally selected orthopedic surgeons, is not when standing alone, "so one-sided as to oppress or unfairly surprise an innocent party" and constitute susbstantive unconscionability Sosa v Paulos, 924 P2d 357 (Utah 1996)

The term in a physician-patient arbitration agreement, requiring payment of costs by a patient who wins less than half the amount of damages sought in arbitration, is substantively unconscionable on its face, considering that under this term, the patient must pay the doctor's attorney's fees and costs, even in situations where the physician is determined to have committed malpractice Sosa v Paulos, 924 P2d 357 (Utah 1996)

Waiver.

Waiver of a contractual right of arbitration must be based on both a finding of participation

in litigation to a point inconsistent with the intent to arbitrate and a finding of prejudice; both prongs of this test turn on the facts of the individual case and, furthermore, consistent with policy considerations, any real detriment is sufficient to support a finding of prejudice. Chandler v. Blue Cross Blue Shield, 833 P.2d 356 (Utah 1992).

Cited in Allred v. Educators Mut. Ins. Ass'n, 909 P.2d 1263 (Utah 1996).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award §§ 11 to 53.

C.J.S. — 6 C.J.S. Arbitration §§ 7 to 57.

A.L.R. — Attorney's submission of dispute to arbitration, or amendment of arbitration agreement, without client's knowledge or consent, 48 A.L.R.4th 127.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

Awarding attorneys' fees in connection with arbitration, 60 A.L.R.5th 669.

78-31a-4. Court order to arbitrate [Repealed effective May 15, 2003].

(1) The court, upon motion of any party showing the existence of an arbitration agreement, shall order the parties to arbitrate. If an issue is raised concerning the existence of an arbitration agreement or the scope of the matters covered by the agreement, the court shall determine those issues and order or deny arbitration accordingly.

(2) If an issue subject to arbitration under the alleged arbitration agreement is involved in an action or proceeding pending before a court having jurisdiction to hear motions to compel arbitration, the motion shall be made to that court. Otherwise, the motion shall be made to a court with proper venue.

(3) An order to submit an agreement to arbitration stays any action or proceeding involving an issue subject to arbitration under the agreement. However, if the issue is severable from the other issues in the action or proceeding, only the issue subject to arbitration is stayed. If a motion is made in an action or proceeding, the order for arbitration shall include a stay of the action or proceeding.

(4) Refusal to issue an order to arbitrate may not be grounded on a claim that an issue subject to arbitration lacks merit, or that fault or grounds for the claim have not been shown.

History: C. 1953, 78-31a-4, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003.

NOTES TO DECISIONS

ANALYSIS

Arbitration agreement.
Notice.

Arbitration agreement.

A provision in a professional agreement between employees and a school district creating a grievance procedure by which an employee could seek review of the employer's actions within the chain of command, ultimately reaching the elected board of directors of the district, was not an agreement to submit a dispute to arbitration. Reed v. Davis County Sch. Dist., 892 P.2d 1063 (Utah Ct. App. 1995).

Because § 78-31a-3 provides that only a written agreement to submit a claim to arbitration is valid and enforceable, an arbitration agreement must be written to be enforceable under this section. Jenkins v. Percival, 962 P.2d 796 (Utah 1998).

Because parties to binding arbitration waive substantial rights to formal public adjudication

of their disputes, the Act demands, as a minimum threshold for its enforcement, direct and specific evidence of an agreement between the parties, and in the absence of such direct evidence, the proponent of arbitration has failed to "show an agreement to arbitrate," as required by the Act. McCoy v. Blue Cross & Blue Shield of Utah, 2001 UT 31, 20 P.3d 901.

Notice.

Because an arbitration agreement was an amendment to the plaintiff's insurance policy, it was binding on him only if he was afforded proper notice of the amendment. McCoy v. Blue Cross & Blue Shield, 1999 UT App 199, 980 P.2d 694, aff'd, 20 P.3d 901 (Utah 2001).

Where the defendant failed to show that written notice of an arbitration provision was sent to the plaintiff, failing even to establish that notice of the policy amendment was sent to any specific policy holders, the evidence was insufficient to establish compliance with the policy's notice provision. McCoy v. Blue Cross & Blue Shield, 1999 UT App 199, 980 P.2d 694, aff'd, 20 P.3d 901 (Utah 2001).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award §§ 32 to 34.

C.J.S. — 6 C.J.S. Arbitration §§ 23, 29 to 32.

A.L.R. — State court's power to consolidate arbitration proceedings, 64 A.L.R.3d 528.

Order or decree compelling or refusing to compel arbitration, 6 A.L.R.4th 652.

Which statute of limitations applies to efforts to compel arbitration of a dispute, 77 A.L.R.4th 1071.

Stay of action in federal court until determination of similar action pending in state court, 5 A.L.R. Fed. 10.

Appealability of order staying or refusing to stay, proceedings in federal district court pending arbitration proceedings, 11 A.L.R. Fed. 640.

Appealability of federal court order granting or denying stay of arbitration, 31 A.L.R. Fed. 234.

Disposition by bankruptcy court of request for arbitration pursuant to arbitration agreement to which debtor in bankruptcy is a party, 72 A.L.R. Fed. 890.

What statute of limitations applies to action to compel arbitration pursuant to § 301 of Labor Management Relations Act (29 USCS § 185), 96 A.L.R. Fed. 378.

78-31a-5. Appointment of arbitrators [Repealed effective May 15, 2003].

(1) If the arbitration agreement specifies a procedure for appointment of arbitrators, it shall be followed.

(2) If no procedure is specified, or if the agreed method fails or cannot be followed for any reason, or if an arbitrator fails or is unable to act, any party to the arbitration agreement may move the court to appoint one or more arbitrators, as necessary.

(3) The motion shall state:

(a) the issues to be arbitrated;

(b) any arbitrators the party may propose for appointment; and

(c) the qualifications of any proposed arbitrators.

(4) Upon this motion, the court shall appoint the necessary arbitrators, whom the court shall find qualified to arbitrate the issues stated in the motion.

History: C. 1953, 78-31a-5, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003.

Cross-References. — Service of notices, U.R.C.P. 6(d), (e).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award §§ 84 to 107.

C.J.S. — 6 C.J.S. Arbitration §§ 58 to 75.

A.L.R. — Validity and effect under state law

of arbitration agreement provision for alternative method of appointment of arbitrator where one party fails or refuses to follow appointment procedure specified in agreement, 75 A.L.R.5th 595.

78-31a-6. Conference prior to arbitration hearing [Repealed effective May 15, 2003].

(1) The arbitrators either in their discretion, or at the request of any party, may conduct a conference prior to the arbitration hearing. The conference shall be held no fewer than ten days before the arbitration hearing. Notice of the conference shall be made by certified mail to all parties to the arbitration hearing, and no fewer than ten days before the conference.

(2) The subpoena powers provided in Section 78-31a-8 apply to conferences conducted under this section.

(3) The conference shall allow the parties to consider any matters which may aid in the disposition of the arbitration hearing, including, but not limited to:

(a) identifying and clarifying the issues;

(b) determining the scope and scheduling of discovery of evidence under Section 78-31a-7;

(c) stipulating to the admission of facts and documents;

(d) identity of witnesses.

(4) The arbitrators shall make a written record of action taken at the conference, including a finding of any agreements made between the parties regarding matters discussed. This finding controls at the arbitration hearing, unless the arbitrators find that a modification at the hearing is necessary to prevent a manifest injustice.

History: C. 1953, 78-31a-6, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003.

78-31a-7. Arbitration hearing — Procedure [Repealed effective May 15, 2003].

(1) The arbitrators shall appoint a time and place for the arbitration hearing and serve each party to the proceeding with notice of the time and place, personally or by certified mail. Notice shall be served not fewer than 30 days before the date of hearing, unless both parties stipulate to a waiver or modification of this notice requirement. Appearance at the hearing waives the notice required by this section. The arbitrators may adjourn the hearing from time to time as necessary, and on request of a party or upon their own motion may postpone the hearing to a date not later than the date fixed by the arbitration agreement for making the award, unless the parties consent to a later date. The arbitrators shall hear and determine the controversy upon the evidence produced, notwithstanding that a party duly notified fails to appear. The court upon motion may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(2) Each party to the arbitration proceeding is entitled, in person or through counsel, to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(3) The hearing shall be recorded in a manner agreed upon by the parties. Costs of making a record shall be apportioned as directed by the arbitrators.

(4) The hearing shall be conducted by all the arbitrators, but a simple majority of them may determine any questions and render a final award. If during the course of the hearing an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators may continue the hearing and determination of the controversy, or additional arbitrators may be appointed as provided in Section 78-31a-5.

(5) Unless otherwise provided by the arbitration agreement or by law, the powers of the arbitrators are exercised by majority vote.

History: C. 1953, 78-31a-7, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003.

Cross-References. — Service of notices, U.R.C.P. 6(d), (e).

NOTES TO DECISIONS

ANALYSIS

Notice.
Right to produce evidence and be heard.

Notice.

It is sufficient if the parties admit in their pleadings notice of the meeting of arbitrators. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353 (1932).

Right to produce evidence and be heard.

The parties have a right to be heard on their proofs, and it is the duty of arbitrators to hear all the evidence material to the matter in controversy. Giannopulos v. Pappas, 80 Utah 442, 15 P.2d 353 (1932).

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award §§ 108 to 123.

C.J.S. — 6 C.J.S. Arbitration §§ 76 to 94.

A.L.R. — Insurance, necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of loss, 25 A.L.R.3d 680.

Participation in arbitration proceedings as waiver to objections to arbitrability under state law, 56 A.L.R.5th 757.

78-31a-8. Arbitration hearing — Powers of arbitrators [Repealed effective May 15, 2003].

(1) Arbitrators may administer oaths and issue subpoenas for the attendance of witnesses or the production of books, records, documents, and other evidence. Subpoenas shall be served, and upon motion to the court by a party or the arbitrators, enforced as provided by law for the service and enforcement of subpoenas in civil actions.

(2) The arbitrators either in their discretion, or at the request of any party, may order:

(a) a party to provide any other party with information which is determined by the arbitrator to be relevant to the determination of the issues to be arbitrated; or

(b) the use of requests for discovery as provided in the Utah Rules of Civil Procedure, except that the time a party has to respond to any discovery request shall be determined by the arbitrators in their discretion.

(3) Any law compelling a person under subpoena to testify is applicable to this chapter.

(4) The same fees prescribed for the attendance of witnesses in civil actions shall be paid to witnesses subpoenaed in arbitration proceedings

History: C. 1953, 78-31a-8, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002 ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place effective May 15, 2003

Cross-References. — Contempt generally § 78-32-1 et seq.

Contempt of process of nonjudicial officer, § 78-32-15

Depositions and discovery generally, U.R.C.P. 26 to 37

Subpoenas, U.R.C.P. 45

Witnesses' fees § 78-46-28

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am. Jur. 2d Arbitration and Award § 121

C.J.S. — 6 C.J.S. Arbitration § 87

78-31a-9. Arbitration hearing — Joinder of parties [Repealed effective May 15, 2003].

(1) Upon motion to the arbitration panel by any party, a person who is subject to service of process for the subject matter of the arbitration, and who is a party to the arbitration agreement, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those who are already parties, or (b) he claims or the motion alleges he has an interest relating to the subject of the action and the disposition of the action in his absence impedes his ability to protect that interest, or subjects any of the persons already parties to a substantial risk of incurred multiple or otherwise inconsistent obligations by reasons of his claimed interest.

(2) Any person joined as a party to the arbitration has the same time to answer as was given to the initial defendant in the case.

History: C. 1953, 78-31a-9, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002 ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

78-31a-10. Arbitration award [Repealed effective May 15, 2003].

(1) The arbitration award shall be in writing and signed by the arbitrators who join in the award. A copy of the award shall be served upon each party personally, or by certified mail, or as otherwise provided by the arbitration agreement.

(2) An arbitration award shall be made within the time set by the agreement, or if a time is not set, within a time the court orders pursuant to the motion of any party to the arbitration proceeding. The parties may at any time, by written agreement, extend the time for award. A party to an arbitration proceeding waives any objection based on the ground that the award was not timely rendered unless the arbitrators are notified of the objection before service of the award.

History: C. 1953, 78-31a-10, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002 ch. 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Affirmative defense, arbitration and award as, U R C P 8(c)

NOTES TO DECISIONS

ANALYSIS

Effect and conclusiveness of award
Procedural requirements

Effect and conclusiveness of award.

The award of arbitrators, acting within the scope of their authority, determines the rights of the parties to it as efficiently as a judgment secured by legal procedure, and is binding on the parties until set aside or its validity is questioned in some proper manner Giannopulos v Pappas, 80 Utah 442, 15 P 2d 353 (1932)

Procedural requirements.

An arbitration award will not be disturbed on account of irregularities or informalities, failure to comply with procedural requirements such as the signature requirement in this section is an irregularity and as such cannot by itself support appellate intervention Allred v Educators Mut Ins Ass'n, 909 P 2d 1263 (Utah 1996)

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award §§ 124 to 150

C.J.S. — 6 C J S Arbitration §§ 95 to 122

A.L.R. — Determination of validity of arbitration award under requirement that arbitrators shall pass on all matters submitted, 36 A L R 3d 649

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A L R 3d 815

Modern status of rules respecting concurrence of all arbitrators as condition of binding award under private agreement not specifying unanimity, 83 A L R 3d 996

Arbitrator's power to award punitive damages, 83 A L R 3d 1037

Referee's failure to file report within time specified by statute, court order, or stipulation as terminating reference, 71 A L R 4th 889

78-31a-11. Costs [Repealed effective May 15, 2003].

The expenses, fees, and other costs of the arbitrators, exclusive of attorney's fees, shall be paid as provided in the award, unless another provision for the payment of fees is made in the arbitration agreement.

History: C. 1953, 78-31a-11, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award § 139

C.J.S. — 6 C J S Arbitration §§ 179 to 183

A.L.R. — Liability of parties to arbitration for costs, fees, and expenses, 57 A L R 3d 633

Awarding attorneys' fees in connection with arbitration, 60 A L R 5th 669

78-31a-12. Confirmation of award [Repealed effective May 15, 2003].

Upon motion to the court by any party to the arbitration proceeding for the confirmation of the award, and 20 days notice to all parties, the court shall confirm the award unless a motion is timely filed to vacate or modify the award.

History: C. 1953, 78-31a-12, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and

enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Motions and orders generally, U R C.P. 6(b), 6(d), 6(e), 7(b), 43(b).

NOTES TO DECISIONS

Cited in Softsolutions, Inc. v. Brigham Young Univ., 2000 UT 46, 1 P.3d 1095

COLLATERAL REFERENCES

C.J.S. — 6 C.J.S. Arbitration §§ 120 to 122

78-31a-13. Modification of award by arbitrators [Repealed effective May 15, 2003].

(1) Upon motion of any party to the arbitrators or upon order of the court pursuant to a motion, the arbitrators may modify the award if:

(a) there is an evident miscalculation of figures or description of a person or property referred to in the award;

(b) the award is imperfect as to form; or

(c) necessary to clarify any part of the award.

(2) A motion to the arbitrators for modification of an award shall be made within 20 days after service of the award upon the moving party. Written notice that a motion has been made shall be promptly served personally or by certified mail upon all other parties to the proceeding. The notice of motion for modification shall contain a statement that objections to the motion be served upon the moving party within ten days after receipt of the notice. Any award modified by the arbitrators is subject to the provisions of Sections 78-31a-11, 78-31a-12, and 78-31a-14.

History: C. 1953, 78-31a-13, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Motions and orders generally, U R C.P. 6(b), 6(d), 6(e), 7(b), 43(b)

NOTES TO DECISIONS

ANALYSIS

Failure to timely file
Time for filing motion
—After judgment confirming award

Failure to timely file.

The procedural safeguards set out in Subsection (1) of this section and 78-31a-14(2) are designed to protect against arbitrary, unfair, or prejudicial treatment in the arbitration process, however, failure to timely file a motion to either modify or vacate an award forecloses a comprehensive review on the merits of the arbitration process. Allred v. Educators Mut. Ins Ass'n, 909 P.2d 1263 (Utah 1996).

Time for filing motion.

—After judgment confirming award.

The filing of motions to vacate or modify an award is barred once the court has entered a judgment confirming the award. Robinson & Wells v Warren, 669 P.2d 844 (Utah 1983)

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award § 143

A.L.R. — Power of arbitrator to correct, or power of court to correct or resubmit, nonlabor award because of incompleteness or failure to pass on all matters submitted, 36 A.L.R.3d 939

Power of court to resubmit matter to arbitrators for correction or clarification, because of

ambiguity or error in, or omission from, arbitration award, 37 A L R 3d 200

78-31a-14. Vacation of the award by court [Repealed effective May 15, 2003].

(1) Upon motion to the court by any party to the arbitration proceeding for vacation of the award, the court shall vacate the award if it appears:

(a) the award was procured by corruption, fraud, or other undue means;

(b) an arbitrator, appointed as a neutral, showed partiality, or an arbitrator was guilty of misconduct that prejudiced the rights of any party;

(c) the arbitrators exceeded their powers;

(d) the arbitrators refused to postpone the hearing upon sufficient cause shown, refused to hear evidence material to the controversy, or otherwise conducted the hearing to the substantial prejudice of the rights of a party, or

(e) there was no arbitration agreement between the parties to the arbitration proceeding.

(2) A motion to vacate an award shall be made to the court within 20 days after a copy of the award is served upon the moving party, or if predicated upon corruption, fraud, or other undue means, within 20 days after the grounds are known or should have been known.

(3) If an award is vacated on grounds other than in Subsection (1)(e), the court may order a rehearing before new arbitrators chosen as provided in the arbitration agreement or by the court. Arbitrators chosen by the court shall be found qualified to arbitrate the issues involved. The time for making an award, if specified in the arbitration agreement, is applicable to a rearbitration proceeding. If not specified, the court shall order the award upon rearbitration to be made within a reasonable time. The time for making an award under a rearbitration proceeding commences on the date of the court's order for rearbitration.

(4) If the motion to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.

History: C. 1953, 78-31a-14, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Motions and orders generally, U R C P 6(b), 6(d), 6(e), 7(b), 43(b)

NOTES TO DECISIONS

ANALYSIS

Affidavit or testimony of arbitrator.

While an arbitrator may not by affidavit or testimony impeach his own award or show fraud or misconduct on the part of the arbitrators or any of them, the testimony or affidavit of an arbitrator is admissible to establish what matters were presented to and considered by the arbitrators, and any arbitrator is a competent witness to establish such facts Giannopulos v Pappas, 80 Utah 442, 15 P2d 353 (1932)

Grounds.

—In general.

Awards will not be disturbed on account of irregularities or informalities or because the court does not agree with the award, so long as the proceeding has been fair and honest, and the substantial rights of the parties have been respected Bivans v Utah Lake Land Water & Power Co , 53 Utah 601, 174 P 1126 (1918)

Ordinarily a court has no authority to review the action of arbitrators to correct errors or to substitute its conclusion for that of the arbitrators acting honestly and within the scope of their authority Giannopulos v Pappas, 80 Utah 442, 15 P2d 353 (1932) Utility Trailer Sales of Salt Lake, Inc v Fake, 740 P2d 1327 (Utah 1987)

Subsection (1) provides relief for certain defined improprieties that are evident to a party by the close of the proceeding or upon receipt of the award, and Subsection (2)s twenty-day time bar ensures that parties will not bring belated challenges based upon information known or that reasonably should have known before the expiration of the twenty-day time bar DeVore v IHC Hosps 884 P2d 1246 (Utah 1994)

When an award is challenged on the ground that the arbitrator exceeded his or her authority, the trial court applies a two-pronged test First, a court must review the submission agreement and determine whether the arbitrator's award covers areas not contemplated by the agreement The second prong to be applied by the trial court is to determine whether an award is "without foundation in reason or fact ' This second prong is referred to as the "irrationality principle' and is based on the assumption that the parties, by their agreement to arbitrate, have given the arbitrator the authority to decide their dispute on a rational basis Softsolutions Inc v Brigham Young Univ 2000 UT 46, 1 P3d 1095

The district court properly applied the two-pronged test in Buzas Baseball Inc v Salt Lake Trappers Inc 925 P2d 941 (Utah 1996) in determining that there was no basis to vacate the award under Subsection (1)(c) of this section, where the arbitrator clearly stayed within the confines of the Submission Agreement, and his ruling had a foundation in reason and fact Softsolutions, Inc v Brigham Young Univ, 2000 UT 46, 1 P3d 1095

—Arbitrator exceeded powers.

The arbitrator exceeded the authority granted to him where he considered things not addressed in the arbitration agreement between the parties, because any modification must be in writing and a written arbitration agreement may not be implicitly modified merely by the parties actions in bringing evidence of matters outside the scope of the agreement Pacific Dev, L C. v Orton, 2001 UT 36, 23 P3d 1035

—Corruption, fraud, etc.

Fraud, bad faith, and prejudicial imposition will vitiate an award, even though a contract of submission provides that such award shall be absolute and conclusive and without appeal Bivans v Utah Lake Land, Water & Power Co , 53 Utah 601, 174 P. 1126 (1918)

—Misconduct.

Before the misconduct of any arbitrators will afford a ground for vacating an award, it must appear that the rights of a party have been prejudiced Giannopulos v Pappas, 80 Utah 442, 15 P2d 353 (1932)

—No factual basis.

Where an arbitrator specifically recognized the implied duty of good faith and fair dealing, but concluded that, without a factual basis for the plaintiff's allegation, the plaintiff had not met its burden of proof, the arbitrator did not manifestly disregard the law in finding no support for the argument that the defendant had breached its implied duty of good faith Pacific Dev, L C v Orton, 1999 UT App 217, 982 P2d 94

—Partiality.

A court shall vacate an award under Subsection (1)(b) if a reasonable person would conclude that an arbitrator, appointed as neutral, showed partiality or was guilty of misconduct that prejudiced the rights of any party Furthermore, the burden of proof falls on the movant, and the evidence of partiality must be certain and direct, not remote, uncertain, or speculative DeVore v IHC Hosps , 884 P2d 1246 (Utah 1994)

It was not error to deny a motion to vacate based on the arbitrator's failure to disclose his relationship with a nonparty, where there was no certain and direct evidence of an enduring relationship and the nonparty played an insignificant and tangential role in the proceedings DeVore v IHC Hosps , 884 P2d 1246 (Utah 1994)

—Refusal to hear evidence.

Where one party to an arbitration agreement requests one of three arbitrators for further time to present certain testimony and was assured by the arbitrator that he would be given an opportunity before the award was made to present such further evidence, which promise the arbitrator did not keep, and did not even convey the request to the other arbitrators, such misbehavior came within the provisions of former Subsection 78-31-16(3), which contained provisions similar to Subsection (b) of this section Giannopulos v Pappas, 80 Utah 442 15 P2d 353 (1932)

—Statutory grounds exclusive.

No other grounds for vacating or setting aside an award than those specified can be taken advantage of Giannopulos v Pappas, 80 Utah 442, 15 P2d 353 (1932) (decided under similar provisions of former § 78-31-16)

Time for filing motion.

The procedural safeguards set out in §§ 78-31a-13(1) and Subsection (2) of this section are designed to protect against arbitrary, unfair, or prejudicial treatment in the arbitration process, however, failure to timely file a motion to either modify or vacate an award forecloses a comprehensive review on the merits of the arbitration process Allred v Educators Mut Ins Ass'n, 909 P2d 1263 (Utah 1996)

—After judgment confirming award.

The filing of motions to vacate or modify an award is barred once the court has entered a judgment confirming the award Robinson & Wells v Warren, 669 P2d 844 (Utah 1983)

—Tolling provision.

The reference in the tolling provision of Subsection (2) to 'corruption, fraud, and other undue means' encompasses arbitration improprieties of which a party did not know and could not reasonably have known by the close of the proceeding or within twenty days after receiving a copy of the award Therefore, a motion under this section was timely when filed within twenty days after the movant received information, nearly one year after the award, regarding possible bias of the arbitrator DeVore v IHC Hosps , 884 P2d 1246 (Utah 1994)

Cited in Jeppsen v Piper, Jaffray & Hopwood, Inc , 879 F Supp 1130 (D Utah 1995), Buzas Baseball, Inc v Salt Lake Trappers, Inc , 925 P2d 941 (Utah 1996), Intermountain Power Agency v Union Pac R R , 961 P2d 320 (Utah 1998)

COLLATERAL REFERENCES

Utah Law Review. — Recent Case Law Developments Judicial Standards of Review Governing Appeals from Arbitration and the Relation Between the Federal and Utah Arbitration Statutes, 1997 Utah L Rev 1096

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award §§ 167 to 189

C.J.S. — 6 C J S Arbitration §§ 149 to 169

A.L.R. — Refusal of arbitrators to receive evidence, or to permit briefs or arguments, on particular issues as grounds for relief from award, 75 A L R 3d 132

Admissibility of affidavit or testimony of arbitrator to impeach or explain award, 80 A L R 3d 155

What constitutes corruption, fraud, or undue means in obtaining arbitration award justifying avoidance of award under state law, 22 A L R 4th 366

Setting aside arbitration award on ground of interest or bias of arbitrators — insurance appraisals or arbitrations, 63 A L R 5th 675

Setting aside arbitration award on ground of interest or bias of arbitrators — torts, 64 A L R 5th 475

Setting aside arbitration award on ground of interest or bias of arbitrator — labor disputes, 66 A L R 5th 611

Setting aside arbitration award on ground of interest or bias of arbitrators — commercial, business, or real estate transactions, 67 A L R 5th 179

78-31a-15. Modification of award by court [Repealed effective May 15, 2003].

(1) Upon motion made within 20 days after a copy of the award is served upon the moving party, the court shall modify or correct the award if it appears.

(a) there was an evident miscalculation of figures or an evident mistake in the description of any person or property referred to in the award;

(b) the arbitrators' award is based on a matter not submitted to them, if the award can be corrected without affecting the merits of the award upon the issues submitted; or

(c) the award is imperfect as to form.

(2) If the motion is granted, the court shall modify and correct the award and confirm it as modified and corrected Otherwise, the court shall deny the motion and confirm the award of the arbitrators.

(3) A motion to modify or correct an award may be joined in the alternative with a motion to vacate the award

History: C. 1953, 78-31a-15, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Motions and orders generally, U R C P 6(b), 6(d), 6(e), 7(b), 43(b)

NOTES TO DECISIONS

ANALYSIS

Basis for modification
Cited

Basis for modification.

Because the matter of royalties fell within the issues submitted for arbitration, there was no basis for the district court to modify the award under Subsection (1)(b) Softsolutions, Inc v Brigham Young Univ, 2000 UT 46, 1 P3d 1095

Cited in DeVore v IHC Hosps , 884 P2d 1246 (Utah 1994), Buzas Baseball, Inc v Salt Lake Trappers, Inc , 925 P2d 941 (Utah 1996)

COLLATERAL REFERENCES

Utah Law Review. — Recent Case Law Developments Judicial Standards of Review Governing Appeals from Arbitration and the Relation Between the Federal and Utah Arbitration Statutes, 1997 Utah L Rev 1096

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award § 143

C.J.S. — 6 C J S Arbitration §§ 160, 168

78-31a-16. Award as judgment [Repealed effective May 15, 2003].

An award which is confirmed, modified, or corrected by the court shall be treated and enforced in all respects as a judgment Costs incurred incident to any motion authorized by this chapter, including a reasonable attorney's fee, unless precluded by the arbitration agreement, may be awarded by the court.

History: C. 1953, 78-31a-16, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

Cross-References. — Arbitration and award as affirmative defense, U R C P 8(c)

NOTES TO DECISIONS

ANALYSIS

Attorney fees
Cited

Attorney fees.

Defendant was entitled to attorney s fees at a rate it would have cost defendant to litigate the matter with comparable outside counsel especially when the contract, controlling statutes and case law supported such an award Softsolutions Inc v Brigham Young Univ, 2000 UT 46, 1 P3d 1095

Cited in Buzas Baseball, Inc v Salt Lake Trappers Inc 925 P2d 941 (Utah 1996), Intermountain Power Agency v Union Pac R R , 961 P2d 320 (Utah 1998), Pacific Dev, L C v Orton, 1999 UT App 217, 982 P2d 94, Pacific Dev , L C v Orton, 2001 UT 36, 23 P3d 1035

COLLATERAL REFERENCES

Utah Law Review. — Recent Case Law Developments Judicial Standards of Review Governing Appeals from Arbitration and the Relation Between the Federal and Utah Arbitration Statutes, 1997 Utah L Rev 1096

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award § 166

C.J.S. — 6 C J S Arbitration § 124

A.L.R. — Awarding attorneys' fees in connection with arbitration, 60 A L R 5th 669

78-31a-17. Motions [Repealed effective May 15, 2003].

(1) Notice of an initial motion for an order of arbitration shall be served as provided by law for the service of a summons, unless otherwise specified by the parties in the arbitration agreement.

(2) A motion to the court or the arbitrators shall be made and heard as provided by law for motions in civil actions, except as otherwise specified in this chapter.

(3) Notice in writing of the motion shall be served on the adverse party as provided by law for civil actions.

History: C. 1953, 78-31a-17, enacted by L. 1985, ch. 225, § 1.
Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

78-31a-18. Location for arbitration [Repealed effective May 15, 2003].

If an arbitration agreement provides that arbitration be held in a specified county, the district court of that county has jurisdiction to hear the initial motion for arbitration. If no provision is made, hearing on the initial motion for arbitration shall be before the district court of the county where the adverse party resides or has a place of business or, if the adverse party has no residence or place of business in this state, in the county in which the adverse party is served. Unless the court with jurisdiction otherwise orders, all subsequent motions or hearings incident to the arbitration proceeding shall be heard by the court hearing the initial motion.

History: C. 1953, 78-31a-18, enacted by L. 1985, ch. 225, § 1.
Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

78-31a-19. Appeals [Repealed effective May 15, 2003].

An appeal may be taken by any aggrieved party as provided by law for appeals in civil actions from any court order:

(1) denying a motion to compel arbitration;
(2) granting a motion to stay arbitration;
(3) confirming or denying confirmation of an arbitration award;
(4) modifying or correcting an award; or
(5) vacating an award without directing rearbitration.

History: C. 1953, 78-31a-19, enacted by L. 1985, ch. 225, § 1.
Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

NOTES TO DECISIONS

ANALYSIS

Applicability of section
Vacation without directing rearbitration
Cited

Applicability of section.

This section is procedural and would therefore apply to an action in which the complaint was filed before the effective date of the section but the appeal was filed after such date Docutel Olivetti Corp v Dick Brady Sys , 731 P2d 475 (Utah 1986)

A party may seek review of any order denying a motion to compel arbitration, regardless of whether the order is a final judgment or has otherwise been designated as final by the district court under U R C P 54(b) Pledger v Gillespie, 1999 UT 54, 982 P.2d 572

Vacation without directing rearbitration.

Order of court in arbitration case, setting aside award and ordering new hearing without order for resubmission but also affirmatively ordering plaintiffs and interveners to present their claims for damages to receiver of defendant corporation, was final and appealable order Bivans v Utah Lake Land, Water & Power Co , 53 Utah 601, 174 P 1126 (1918)

Cited in Chandler v Blue Cross Blue Shield, 833 P2d 356 (Utah 1992), Miller v USAA Cas Ins Co , 2002 UT 6, 438 P3d 31

COLLATERAL REFERENCES

Am. Jur. 2d. — 5 Am Jur 2d Arbitration and Award §§ 82, 145

C.J.S. — 6 C J S Arbitration §§ 161 to 163

A.L.R. — Appealability of state court's order or decree compelling or refusing to compel arbitration 6 A L R 4th 652

Uninsured and underinsured motorist coverage enforceability of policy provision limiting appeals from arbitration, 23 A L R 5th 801

Appealability of order staying or refusing to stay, proceedings in federal district court pending arbitration proceedings, 11 A L R Fed 640

Appealability of federal court order granting or denying stay of arbitration, 31 A L R Fed *234*

78-31a-20. Scope of chapter [Repealed effective May 15, 2003].

This chapter is not intended to provide a means of arbitration exclusive of those sanctioned under common law.

History: C. 1953, 78-31a-20, enacted by L. 1985, ch. 225, § 1.

Repealed effective May 15, 2003. — Laws 2002, ch 326, § 33 repeals this chapter and enacts a new Chapter 31a in its place, effective May 15, 2003

CHAPTER 31a

UTAH UNIFORM ARBITRATION ACT [EFFECTIVE MAY 15, 2003]

ADDENDUM C

ARBITRATION AGREEMENT

Article 1: Agreement to Arbitrate: We hereby agree to submit to binding arbitration all disputes and claims for damages of ıy kind for injuries and losses arising from the medical care rendered or which should have been rendered after the date of this greement. All claims for monetary damages against the physician, and the physician's partners, associates, association, corporation partnership, and the employees, agents and estates of any of them (hereinafter collectively referred to as "Physician"), must be bitrated including, without limitation, claims for personal injury, loss of consortium, wrongful death, emotional distress or punitive ımages. We agree that the Physician may pursue a legal action to collect any fee from the patient and doing so shall not waive the ıysician's right to compel arbitration of any malpractice claim. However, following the assertion of any malpractice claim against e Physician, any fee dispute, whether or not the subject of any existing legal action, shall also be resolved by arbitration.

We expressly intend that this Agreement shall bind all persons whose claims for injuries and losses arise out of medical care ndered or which should have been rendered by Physician after the date of this Agreement, including any spouse or heirs of the ıtient and any children, whether born or unborn at the time of the occurrence giving rise to any claim (hereinafter collectively ferred to as "Patient").

Article 2: Waiver of Right of Trial: We expressly waive all rights to pursue any legal action to seek damages or any other medies in a court of law, including the right to a jury or court trial, except to enforce our decision to arbitrate, to collect any bitration award and to facilitate the arbitration process as permitted by the Utah Arbitration Act.

Article 3: Procedures and Appointment of Arbitrators: Patient shall serve Physician by certified mail with a written :mand for arbitration which shall specify the nature of the claim, the date of the claimed occurrence, the complained of conduct by e Physician, and a description of the Patients' injuries and damages. Within 60 days after the demand, the parties shall agree upon a :utral arbitrator to be selected from a list of individuals approved as arbitrators by the State or Federal courts of Utah. If the parties ınnot agree upon a neutral arbitrator, the court shall select an individual from that list. The neutral arbitrator shall: preside over the bitration hearing and pre-arbitration conferences; establish scheduling orders; supervise the conduct of discovery to prevent abuse ıd insure efficiency and cost-effectiveness; rule on all motions, including motions for summary judgment and motions to dismiss for ilure to proceed with reasonable diligence; administer oaths; issue subpoenas; and exercise other powers granted to arbitrators in the tah Arbitration Act. Within six months of the demand for arbitration or as otherwise ordered by the neutral arbitrator, Patient shall lect one arbitrator and Physician shall select one arbitrator. Patient and Physician shall pay the fees and expenses of his or her own bitrator. Each party shall share equally the expenses and fees of the neutral arbitrator. The parties agree that the arbitrators have the ınmunity of a judicial officer from civil liability when acting in the capacity of an arbitrator under this Agreement.

All claims based on the same occurrence, incident, or care shall be arbitrated in one proceeding: however, Patient or ıysician shall have the absolute right to arbitrate separately issues of liability and damage upon written request to the neutral bitrator. Arbitration hearings will be held in the County of the Physician's principal place of business or elsewhere as the parties ay agree.

The parties consent to the participation in this arbitration of any person or entity that would otherwise be a proper additional ırty in a court action and which agrees to be bound by the arbitration decision. Any existing court action against such additional :rson or entity shall be stayed upon agreement to participate in the arbitration.

The parties agree that the arbitration proceedings are private, not public, and the privacy of the parties and of the arbitration oceedings shall be preserved.

Article 4: Applicable Law: With respect to any matter not herein expressly provided for, the arbitration shall be governed / the Utah Arbitration Act. All provisions of the Utah Health Care Malpractice Act, with the exception of the notice of intent and e-litigation hearing requirements which the parties hereby waive, shall apply to the arbitration. The comparative fault provisions of tah law apply to the arbitration and the arbitrators shall apportion fault to all persons or entities who contributed to the claimed injury hether or not they are parties to the arbitration.

Article 5: Revocation: This Agreement may be revoked by written notice mailed to the Physician, by certified mail, within) days after signature, and if not revoked shall govern all medical services received by the Patient after the date of this Agreement.

Article 6: Term: the term of this Agreement is one year from the date it is signed. It shall be automatically renewed from :ar to year thereafter unless either party to this Agreement notifies the other of his or her election not to renew in writing delivered by rtified mail prior to the renewal date.

Article 7: Read and Understood: I (Patient or Patient's representative) have read and I understand the above Agreement. I ıderstand that I have the right to have my questions about arbitration answered and I do not have any unanswered questions. I ecute this agreement of my own free will and not under any duress, and I understand that I my signing this agreement is not a quirement in order to receive medical services from Physician.

Article 8: Received Copy: I have received a copy of this document.

Article 9: Severability: If any provision of this Agreement is held invalid or unenforceable, the remaining provisions shall main in full force and shall not be affected by the invalidity of any other provision.

Richard Rosenthal, Inc.
dba Origin Pain & Spine Center

:

Signature of Physician or Authorized Representative — (Date) 4-30

GARY S. BAKER
Name of Patient (Print)

Signature of Patient or Patient's Representative — (Date) 4/3/01

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